No. 79-478

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF SENATES OF THE DISTRICT OF COLUMBIA, CORRECTIONAL COMPLEX AT LORTON, VIRGINIA AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF INMATES OF THE DISTRICT OF COLUMBIA CORRECTIONAL COMPLEX AT LORTON, VIRGINIA AMICI CURIAE

INTEREST OF THE AMICI CURIAE

Amici curiae are the representatives in class action litigation of the 2,000 inmates of the District of Columbia Department of Corrections' Correctional Complex at Lorton, Virginia. These inmates have an intense interest in the

basic questions concerning prison administration and control raised by this case. In three actions, *Nathaniel Wright, III v. Delbert C. Jackson,* Civil Action No. 73-186-A (E.D. Va. 1973), *Pollard v. Washington,* Civil Action No. 2055-71 (D.D.C. 1971), and *Woodard v. Washington,* Civil Action No. 1659-71 (D.D.C. 1971), Lorton inmates have sought injunctive and declaratory relief against the procedures followed in the disciplinary proceedings at the Complex. In their complaints, plaintiffs asserted that the due process clause of the Fifth Amendment to the United States Constitution requires that they be accorded, *inter alia,* the rights to confront their accusers, to cross-examine witnesses, and to be represented by counsel.

On September 12, 1973, the United States District Court for the Eastern District of Virginia (Judge Albert V. Bryan, Jr., presiding) preliminarily granted substantially all relief requested by the *Wright* plaintiffs, and on December 7, 1973, it initially approved a new "Prison Disciplinary Procedures and Code of Prison Offenses," which it incorporated in the final order on January 11, 1974. These procedures required, *inter alia,* that an inmate called before the Lorton disciplinary board for other than a "petty" rule infraction be informed of and accorded the following procedural rights:

(1) written notice of the charges and the time and place of the hearing,
(2) the right to be personally present before the disciplinary board,
(3) the right to remain silent,

(4) the right to counsel or a lay substitute,[1]
(5) the right to present written evidence,
(6) the right to call witnesses,
(7) the right to know the names of and confront his accusers, including correctional officials and inmate informants, unless the prison officials can show that the disclosure of an inmate informant's name would pose a threat to his safety,
(8) the right to cross-examine all witnesses appearing before the board,
(9) the right to be judged by an impartial panel of persons not engaged in any previous investigation of the charges against the accused,
(10) the right to examine the written record or taped recording of the proceedings,
(11) the right to a written appeal, and
(12) the right to receive a copy of the prison disciplinary procedures and rules, with a clear delineation of the possible punishments for violations thereof.

Judge Bryan's decision has been appealed to the Court of Appeals for the Fourth Circuit, and in light of both this Court's decision to hear the present case and the appeal of the *Wright* decision, the United States District Court for the District of Columbia has stayed the *Pollard*

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[1] The court did not reach the question of appointed counsel, because there has been, at least until the present date, an adequate number of private attorneys who are willing to be retained by prisoners without fee, and because of the availability of law students for the representation of prisoners upon request.

and *Woodard* actions. Hence, amici curiae have a substantial interest in the basic due process questions before this Court. They file this brief with the written consent of the parties, pursuant to Rule 42(1) of the Rules of this Court. Copies of the letters of consent are being filed with the Clerk and are appended to this brief.

ARGUMENT

INTRODUCTION AND SUMMARY

In the *Wright* case the District Court held that the Fifth Amendment requires prison authorities to conform prison disciplinary proceedings to some of the elemental standards of due process of law. The Court ruled in substance that the inmate's interest in the accuracy of the fact-finding process in disciplinary proceedings – an interest that the prison authorities share – could be protected by the erection of procedural safeguards without infringing improperly on the governmental interest in maintaining the security and order of the prison. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Among the procedural incidents of the disciplinary process required by Judge Bryan are the rights to counsel, to confrontation of accusers, and to cross-examination of witnesses. Since these three rights lie at the center of the issues in the present case, the amici curiae in the instant brief will describe the disciplinary procedures at Lorton and will then demonstrate, through some of the evidence considered by Judge Bryan, that granting these procedural rights would serve the interests of both the government and the inmate.

I. MANY OF THE PROCEDURAL RIGHTS DEEMED TO BE IMPRACTICAL BY THE STATE OF NEBRASKA HAVE BEEN INSTITUTED AT LORTON

Deposition testimony taken in both the *Wright* and *Pollard* actions shows that many of the procedural rights guaranteed by this Court in *Morrissey v. Brewer, supra,* and by the Eighth Circuit in this case were, in practice, afforded to Lorton inmates even before Judge Bryan's judgment in *Wright.*

The disciplinary process at Lorton was commenced by a correctional officer writing a disciplinary report concerning his observation of an infraction by an inmate. This disciplinary report was transmitted to the shift supervisor who interviewed the inmate as to the substance of the report after reading the report, including the names of accusers, to the inmate. After conducting an investigation, the shift supervisor could transmit the report to a disciplinary board made up of three employees of the Department of Corrections. At the disciplinary hearing before this board, the inmate could make a statement on his own behalf with the assistance of either counsel or a lay substitute. If the charges were sustained, and the disciplinary board recommended that good time be forfeited or that the inmate be transferred to maximum security, then the recommendation would be transmitted to the Superintendent of the Complex who, in turn, must recommend punishment to the Director of Operations. Ordinarily, although not invariably, the disciplinary board was composed of persons who had taken no part in prior investigation of the charges against the inmate; the inmate would be advised that anything he tells the investigating officer may be used against him; the board would telephone witnesses

outside the inmate's presence; and brief summary minutes of the proceedings would be taken.[2]

However, Lorton rules and regulations did not provide inmates with the following procedural incidents in disciplinary hearings, as a matter of right:

(1) the right to receive a copy of an investigatory report prepared by a correctional official prior to the disciplinary hearing;
(2) the right to receive written notice of the charges;
(3) the right to call witnesses in his behalf; and
(4) the right to cross-examine witnesses.[3]

Lorton officials were unable to explain why these rights could not be afforded inmates,[4] and Judge Bryan apparently believed that these minimal due process guarantees could be instituted without impairing any valid state interests.

II. THE RIGHT TO COUNSEL SHOULD EXTEND TO DISCIPLINARY HEARINGS

As just stated, one of the rights that was recognized at Lorton even without any judicial command was the right

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[2] Deposition of James Edward Swoboda, then Associate Administrator of Operations, on August 22, 1973, in Wright v. Jackson, Civil Action No. 73-186-A (E.D. Va. 1973) [hereinafter, Swoboda deposition] at 19-29, 56-57; deposition of Clarence Larry Swain, then Acting Superintendent of Adult Services, on July 31, 1973, in Pollard v. Washington, Civil Action No. 2055-71 (D.D.C. 1972) [hereinafter, Swain deposition] at 18-24; deposition of Thomas P. Gaydos, then Acting Shift Captain, on July 31, 1973, in Pollard v. Washington, *supra*, [hereinafter, Gaydos deposition] at 26, 32-33.

[3] Swoboda deposition at 27, 38; Swain deposition at 19-20, 23.

[4] Swain deposition at 30-33.

to be represented at a disciplinary hearing by counsel or lay substitute. Experience at Lorton demonstrates that the presence of counsel or a lay substitute serves the interests of both the state and the inmate in the administration of the correctional process. Balancing governmental and inmate interests, due process dictates that the inmate's overwhelming interest in an accurate fact-finding process far outweighs any tenuous interest of prison administrators in punishing inmates summarily, and this is the only interest that is claimed to be advanced by denying counsel to inmates.

A. Nature of the Individual's Interest

Prisoners at Lorton have been deprived of statutory "good time" credit, segregated in maximum security facilities, denied privileges accorded other residents of the inmate population, and denied parole[5] as a result of disciplinary hearings conducted by correctional officials.[6]

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[5] Deposition of Lt. Joseph L. Mastin, shift supervisor, on July 30, 1973, in Pollard v. Washington, *supra*, [hereinafter, Mastin deposition] at 10; Swoboda deposition at 58-62; deposition of Leon L. Keenan, administrator of maximum security, on August 22, 1973, in Wright v. Jackson, *supra*, [hereinafter, Keenan deposition] at 7-15; deposition of Carl Coleman, Chairman of District of Columbia Parole Board, on July 30, 1973, in Pollard v. Washington, *supra*, at 21-24.

[6] For example, Kenneth O. Pollard, named plaintiff in the *Pollard* action, alleges that as a result of prison disciplinary hearings, he was (1) segregated from the general inmate population for a period of seven months and placed in punitive segregation and solitary confinement, during a large portion of which time he was refused vitally needed medical attention; (2) denied the opportunity during that entire period to engage in productive work or to participate in rehabilitative, recreational, or vocational programs; (3)

(continued)

Deposition testimony in *Wright* shows that Lorton inmates may be confined to a "control cell," called the "hole," for indefinite periods of time. While so confined, the inmate may not leave the "hole" or see other inmates, and he cannot work, attend educational classes, or receive reading materials or visitors. Some inmates have been confined to the Complex's Maximum Security Facility for up to five months while being denied the right to work or attend classes.[7]

Clearly, such punishment for disciplinary violations inflicts "grievous loss," *Goldberg v. Kelly, supra,* 397 U.S. 254 (1970); *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972), and gives the inmate a "substantial interest" in the accuracy of the fact-finding process by which such a loss is inflicted. Infliction of such a loss calls for some orderly process. *Morrissey v. Brewer, supra,* at 482.

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[6] (continued) deprived of 100 days of previously earned statutory good time; (4) deprived of 365 days of meritorious good time for which he had been recommended by a prison guard; (5) subjected to an investigation resulting from information supplied by Lorton officials to the United States Attorney for the Eastern District of Virginia upon which an indictment was returned but which in turn was found so insufficient as to compel dismissal of the indictment; and (6) subjected to a determination that he had committed felonious assault on a prison guard, which may jeopardize his opportunity for parole.

[7] Keenan deposition at 7-8, 9, 11, 16.

B. The Governmental Interest

The State of Nebraska implies that the presence of counsel would transform informal hearings into formal adversary proceedings which would (1) slow the response of prison officials in quelling potentially riotous situations, (2) erode the respect of inmates for the authority of prison officials, (3) increase tensions in the prison, and (4) disrupt the rehabilitatory function of disciplinary hearings. These contentions have no merit, as demonstrated by the deposition testimony of Lorton officials.

Since mid-1973, Lorton inmates charged with rule infractions have had the unqualified right to have counsel or a lay substitute present at disciplinary hearings[8] and at no time have correctional officials complained that the presence of counsel has interfered with prison security.

This full-scale legal assistance program resulted principally from the efforts of Mr. John O. Boone, former Superintendent of the Lorton Complex, who in early 1972 issued a proposed order on disciplinary procedures which provided in part:

> "The resident may be represented by counsel, a staff member, another resident, or a law student. The resident shall be represented by counsel if the alleged violation constitutes a crime for which he could be prosecuted, unless he intelligently waived this right."[9]

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[8] Swoboda deposition at 21.

[9] Part VII(B), Plaintiff's Exhibit #6 in deposition of John O. Boone, Superintendent of the Lorton Complex, on January 20, 1972, in Woodard v. Washington, *supra*, [hereinafter Boone deposition] at 35.

Although this order was never formally adopted, it led to negotiations between LAWCOR – an American University Law School sponsored student group – and the Lorton Superintendent of Operations, which resulted in a proposal to allow LAWCOR representation of "all residents charged with rule violations which are considered serious by the Institutional Staff."[10] When asked whether he believed that implementation of the LAWCOR proposal would "be contrary to your interests in maintaining the health, security, and order of the prison," Superintendent Boone stated:

> "A. Let me say that this is a draft which I will eventually have to look at or the superintendent to see if this is what we are going to use as procedures so it could come out differently. But I say generally improved procedures is directly related to the safety and security of the community.
>
> "Q. And just to make sure I am clear then the improvement of procedures will help the security, health and safety and order of the community as you see it.
>
> "A. As I see it, yes."[11]

LAWCOR has represented inmates in more than 300 disciplinary hearings and the program is in full operation today.[12]

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[10] Plaintiff's Exhibit #3, Item 1, Boone deposition at 14.

[11] Boone deposition at 21.

[12] Lt. Gaydos extensively described the prison disciplinary procedure at Lorton and described the LAWCOR program. Gaydos deposition at 17-18.

The foregoing testimony indicates that the right to counsel presents no threat to prison security while both the inmate and the State "have interests in the accurate finding of fact and the informed use of discretion – [the inmate] to insure that his liberty is not [further impinged] and the State to make certain that it is [not] unnecessarily interrupting a successful effort at rehabilitation . . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).[13] Both the legal representation program at Lorton and the testimony of Mr. Boone indicate that the presence of counsel at disciplinary hearings will "help the security, health and safety and order of the [prison] community. . . ."[14]

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[13] Indeed, the principal state interest in *Gagnon* which militated against requiring counsel at every probation revocation hearing – a more adversary hearing would be "less attuned to the rehabilitative needs of the individual" – is not prevalent in punitive prison disciplinary hearings. "Decisions regarding the withholding or forfeiture of good time credit generally differ from the parole decision in that they turn solely on the offender's behavior during his period of imprisonment: Good behavior entitles him to early release regardless of anyone's judgment as to his potential for living a law-abiding life in the community. He should therefore have an opportunity to challenge charges of misconduct. Where such charges may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be given reasonable notice of the charges, full opportunity to present evidence and to confront and cross-examine opposing witnesses, and the right to representation by counsel." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

[14] Boone deposition at 21.

III. INMATES SHOULD BE ALLOWED TO CONFRONT THEIR ACCUSERS

Although the rights of confrontation and cross-examination are closely related, the right of confrontation in the prison disciplinary context applies most forcefully to the prisoner's right to know the name of his accuser, who is most often the prison guard who prepared the disciplinary report initiating the charge. The right of cross-examination requires that the accused inmate or his retained counsel be given an opportunity to question and probe both his accusers and any other witnesses at the disciplinary hearing.

The State of California in its amicus brief contends that the right to confront one's accusers would have a volatile effect on "internal prison control and stability" since a charged inmate might retaliate against his accuser.[15]

However, Lt. Joseph L. Mastin, shift supervisor at Lorton and chairman at approximately 50 percent of the disciplinary board proceedings, deemphasized this problem by testifying that in interviewing an inmate against whom a disciplinary report has been filed, he "sometimes" read to the inmate the name of the accusing officer. Moreover,

> "Ninety percent of the time the inmate knows who the guy was that wrote him up anyway."[16]

Another shift supervisor, Lt. Thomas P. Gaydos, supported Lt. Mastin's observations. In response to the question, "How frequently is the [disciplinary] process initiated by a fellow inmate, as opposed to a correctional officer?",

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[15] Brief of Evelle J. Younger, Attorney General of the State of California, Amicus Curiae, at 10-11.

[16] Mastin deposition at 5.

Lt. Gaydos stated: "In comparison, it would be very infrequent."[17] In response to a later question as to whether an inmate was apprised at the disciplinary hearing of the name of the reporting officer, Lt. Gaydos stated that "generally he knows who it is, but if he asks, he's told."[18] Finally, Lt. Gaydos agreed with the proposition that "generally" most of the witnesses who are listed on a disciplinary report are other employees of the Department of Corrections.[19]

The foregoing deposition testimony clearly demonstrates that granting inmates the right to confront their accusers will not jeopardize internal prison security since (1) correctional officers, not inmates, most frequently initiate the disciplinary process, (2) the accused usually knows the name of his accuser, and (3) as provided in Judge Bryan's final order in *Wright*, if prison authorities believe that an inmate accuser's safety would be threatened if he were identified, they may deny the accused any opportunity to confront the informant.

IV. INMATES SHOULD BE PERMITTED TO CROSS-EXAMINE WITNESSES

Since "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 42 U.S.L.W. 4295, 4298 (U.S. Feb. 26, 1974); *see Pointer v. Texas*, 380 U.S. 400, 405 (1965), an inmate who cannot cross-examine witnesses remains deprived of the most essential of

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[17] Gaydos deposition at 7, 13-14.

[18] Gaydos deposition at 32.

[19] Gaydos deposition at 58-59.

procedural safeguards accorded the criminally accused. The State of California claims that cross-examination by inmates at disciplinary hearings could erode their respect for the authority of the prison officials who are cross-examined.[20] However, deposition testimony by Lorton officials in the *Pollard*, *Woodward*, and *Wright* cases demonstrates that granting to inmates the opportunity to cross-examine will not jeopardize state interests.

For example, Superintendent Boone testified that he considered valuable the right of an inmate to call witnesses as long as "it does not involve coercion,"[21] and in support of his proposal that "residents shall be permitted to cross-examine the officer who filed the disciplinary report and other witnesses," he testified as follows:

> "The officers will have some fears and all of that. I think it highly desirable, however, because in fact, I think it would be very, very important in the correctional process that the inmate be able to face the person that charges him with the offenses."[22]

In other words, Superintendent Boone recognized that offenders have certain procedural rights not inconsistent with the goal of rehabilitation since a person who receives what he considers to be unfair treatment is likely to become a difficult subject of rehabilitation. The only problems Superintendent Boone was able to envision from according this right were the "administrative problems" of

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[20] Brief of Evelle J. Younger, Attorney General of the State of California, Amicus Curiae, at 10.

[21] Boone deposition at 22.

[22] Boone deposition at 37-38.

overtime pay for officers called from another shift.[23] These "administrative problems" cannot justify the denial of a fundamental procedural right.

CONCLUSION

Insofar as the issues in this case relate to the constitutional requirements of counsel, confrontation, and cross-examination in prison disciplinary proceedings, the judgment below is amply supported by the experience at the Lorton Complex and should be affirmed.

Respectfully submitted,

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[23] Boone deposition at 38.

APPENDIX

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Re: Wolff, et al. v. McDonnell, et al.
73-679

Dear Mr. Weissbrodt:

Consent of petitioners is hereby given to you on behalf of the prisoners you represent in Pollard v. Washington, Civil Action No. 2055-71 in the United States District Court for the District of Columbia to file an amicus curiae brief herein.

Very truly yours,

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AIR MAIL

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Re: Wolff, et al v. McDonnell, et al
73-679

Dear Mr. Weissbrodt:

Your request to file an *amicus curiae* brief in support of the respondent's petition in the above proceeding has been received.

As counsel for respondent, I hereby consent to your filing an *amicus curiae* brief on behalf of prisoners which you have been representing in Pollard v. Washington, Civil Action No. 2055-71 in the United States District Court for the District of Columbia in the United States Supreme Court.

Very truly yours,

DOUGLAS F. DUCHEK

DFDjm